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No. 92-898

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALIMADAD JATOI
ALCINA F. JATOI,
Petitioners,
v.
AMEGA CONSTRUCTION, INC., et al,
Respondents.

Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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39 pp

QUESTIONS PRESENTED

The Petitioners have failed to comply with one or more of the United States Supreme Court's rules regarding presentation of a Petition for Writ of Certiorari. This is the second such defective petition by one of the Petitioners, Dr. Alimadad Jatoi. Accordingly, the following question is presented for review:

1. Should this Court dismiss Petitioners' Petition as untimely under Rule 13 of the Rules of the Supreme Court of the United States, and as not complying with proper form, under Rules 14 and 33 of the Rules of the Supreme Court of the United States, and further, should this Court award damages or single or double costs to Respondent for a frivolous Petitioners' Petition, under Rule 42.2 of the Rules of the Supreme Court of the United States?

The questions presented by Petitioners rest on a flawed premise -- that the only potentially timely appeal, from Cause No. 91-7003, was decided by the Fifth Circuit Court of Appeals yon any basis other than the fact that Petitioner Alimadad Jatoi had simply presented on a second appeal matters already decided and foreclosed in a final first appeal. Petitioner Alimadad Jatoi merely asserts his constitutional rights were violated in order to present five questions for review.

Those five questions are not properly before this Court. Respondents categorize Petitioners' complaints as follows:

> 2. Do the doctrines of waiver and law of the case prevent re-litigation, on a second appeal, of matters decided on a first appeal which has become final?
>
> 3. Does a federal court possess inherent power to require litigants before it to follow rules of procedure, and to sanction litigants or dismiss their causes of action should they fail to follow these rules, following notice and an opportunity to respond?

LIST OF PARTIES

Amega Construction, Inc. is a Texas corporation, and a subsidiary of G.A., S.A., a French corporation. Benedict Industries, Inc. is a Texas corporation.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 2
- A. Factual Background 2
- B. Procedural History: Cause No. 91-7003 3
- C. Procedural History: Cause No. 91-1086 and No. 92-1057 7

REASONS THE PETITION SHOULD BE DENIED . 8
- I. THIS COURT HAS NO JURISDICTION OVER TWO OF THE THREE APPEALS PRESENTED IN THIS PETITION FOR WRIT OF *CERTIORARI* 8
- II. THIS IS AN ORDINARY DISPUTE, CONCERNING WELL-SETTLED DOCTRINES OF LAW OF THE CASE AND WAIVER, AND RAISES NO SPECIAL OR IMPORTANT ISSUES. 8

A. The issues presented by Jatoi in this second appeal have already been decided against him in an appeal that has become final. 9

B. Dr. Jatoi has waived his point on the actions of his trial counsel by his failure to adequately brief them. 14

C. The trial court did not abuse its discretion in denying Jatoi's Rule 60(b)Motion. 16

D. Rule 60(b) is not an excuse to re-litigate, and attorney conduct is not an excuse under Rule 60(b). 17

E. The trial court committed no "plain error" and acted within its discretion in conducting the trial. 20

F. The law favors settlement. . . . 23

III. THE FEDERAL COURTS HAVE THE INHERENT POWER TO SANCTION LITIGANTS FOR FRIVOLOUS APPEALS 24

IV. SANCTIONS FOR A FRIVOLOUS PETITION ARE APPROPRIATE. . . . 26

CONCLUSION 27

TABLE OF AUTHORITIES

CASES **PAGE**

Ackerman v. United States,
340 U.S. 193 (19[illegible]) 20

Adams-Lundy v. Association of Professional Flight Attendants,
792 F.2d 1368 (5th Cir. 1986) 9

Aetna Insurance Co. v. Jatoi,
No. 91-7003 (5th Cir. June 30, 1992) 25

Aetna Insurance Co. v. Jatoi, No. 91-7003
(5th Cir. July 21, 1992) 26

Amega Construction, Inc. v. Jatoi,
No. 91-1086 (5th Cir. August 23,
1991) 9, 12, 13, 14, 15, 16, 20, 21, 22, 24

Bernard v. Missouri Division of Employment Security,
95 F.R.D. 107 (W.D. Mo. 1982) 17, 18

Billmeyer v. Tovar,
469 U.S. 872 (1984) 8

Blinder, Robinson & Co. v. SEC,
748 F.2d 1415 (10th Cir. 1984),
cert. denied, 471 U.S. 1125 (1985) 18

Brown v. Trustees of Boston University, 891 F.2d 337 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990) 15

Clarion Corp. v. American Home Products Corp., 494 F.2d 860 (7th Cir.), *cert. denied*, 419 U.S. 870 (1974) 24

Coghlan v. Starkey, 852 F.2d 806 (5th Cir. 1988) 24

Faudree v. Irons City Sand & Gravel Co., 315 F.2d 647 (3d Cir. 1963) 21

Foret v. Southern Farm Bureau Life Insurance Co., 918 F.2d 534 (5th Cir. 1991) 24

Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285 (5th Cir. 1989) 16

Girard v. Drexel Burnam Lambert, Inc., 805 F.2d 607 (5th Cir. 1986) 10

Hand v. United States, 441 F.2d 529 (5th Cir. 1971) 16

Haney v. Mizell Memorial Hospital, 744 F.2d 1467 (11th Cir. 1984) 22

Harris v. Steelweld Equipment Co.,
869 F.2d 396 (8th Cir.),
cert. denied, 493 U.S. 817 (1989) 21

Heller Financial, Inc. v.
Midwhey Powder Co.,
883 F.2d 1286 (7th Cir. 1989) 15

Hennessy v. Bacon,
137 U.S. 78 (1890) 23

Hyde v. Van Wormer, 474 U.S. 992 (1985) 26

Link v. Wabash Railroad, 370 U.S.
626 (1962) 19

Loyd v. Carnation Co., 101 F.R.D. 346
(M.D.N.C. 1984) 19

Missouri v. Jenkins 495 U.S. 33 (1990) 8

Morrison v. Duckworth, 898 F.2d 1298
(7th Cir. 1990) 10

Natasha, Inc. v. Evita Marine
Charters, Inc., 763 F.2d 468
(1st Cir. 1985) 25

Peake v. First National Bank
and Trust Co., 101 F.R.D. 544
(W.D. Mich. 1984) 18

Pelican Production Corp.
v. Marino, 893 F.2d 1143
(10th Cir. 1990) 18

Propst v. Greene, 123 F.R.D. 535
(W.D.N.C. 1988) 22

SEC v. Hatch, 128 F.R.D. 58
(D.N.J. 1989) 17

Terrain Enterprises, Inc. v.
The Western Casualty and Surety Co.,
774 F.2d 1320 (5th Cir. 1985),
cert. denied, 475 U.S. 1121 (1986) 23

Trecker v. Scag, 747 F.2d 1176
(7th Cir. 1984), *cert. denied*,
471 U.S. 1066 (1985) 24,25

Ullman v. Olwine, Connelly, Chase,
O'Donnell & Weyher, 123 F.R.D. 253
(S.D. Ohio 1987), *aff'd*, 857 F.2d 1475
(6th Cir. 1988), *cert. denied*,
489 U.S. 1080 (1989) 22,23

United States v. Ballard,
779 F.2d 287 (5th Cir.),
cert. denied, 475 U.S. 1109 (1986) 15

United States v. Don B. Hart
Equity Pure Trust, 818 F.2d 1246
(5th Cir. 1987) 10

United States v. Erdoss,
440 F.2d 1221 (2d Cir.),
cert. denied, 404 U.S. 849 (1971) 19

United States v. Lindell,
881 F.2d 1313 (5th Cir. 1989),
cert. denied, 493 U.S. 1087 (1990) 15

United States v. Phelps,
733 F.2d 1464 (11th Cir. 1984) 22

Weaver v. Puckett, 896 F.2d 126
(5th Cir.), *cert denied*
___ U.S. ___, 111 S.Ct. 427,
112 L.Ed.2d 411 (1990) 15

STATUTES AND RULES

Sup.Ct.R.10. 8

Sup.Ct.R.13 . . . . . i, 8

Sup.Ct.R.14. . . . . i, 7, 15

Sup.Ct.R.33. . . . . i, 15

Sup.Ct.R.42.2 . . . . . i,26

18 U.S.C.1961 (1984) 6

Fed.R.App.P.28 . . . . . 14, 15

Fed.R.App.P.38 24

Fed.R.Civ.P. 16 22

Fed.R.Civ.P.60(b) 3, 4, 15, 16, 17, 18, 19, 23

5th Cir.R. 28.3. 14

5th Cir.R. 47.5.3. 10

TREATISES

C. Wright & A. Miller,
Federal Practice and Procedure:
Civil §2863 (1973) 17

C.Wright & A. Miller, Federal
Practice and Procedure, §2858(1973) 17

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To The United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Amega Construction, Inc. ("Amega") and Benedict Industries, Inc. ("Benedict"), respectfully request that this Court deny the Petition for Writ of *Certiorari*, seeking review of three judgments of the United States Court of Appeals for the Fifth Circuit. All opinions are unreported, and are reproduced in Petitioners' Appendix as Exhibits A-D.

STATEMENT OF THE CASE

Petitioners Alimadad Jatoi and Alcina F. Jatoi fail to raise any special or important reasons to warrant granting their Petition for a Writ of *Certiorari*. The arguments made by the Jatois involve issues that are well-settled and do not involve conflicting decisions between the United States courts of appeals or other state courts of last resort. The Jatois' claims do not implicate any federal constitutional provision. This statement will describe the pertinent facts omitted from the Jatois' statement of the case.

A. Factual Background

This lawsuit is essentially a dispute over a building contract. This litigation concerns the construction of a five-story office tower and attached building in Bedford, Texas. Both structures were completed in 1985, and the tower was fully leased to a tenant in 1986. Record 001831; Transcript II-186-87; III-193-95.[1] The buildings, however, were never paid for by Dr. Alimadad Jatoi, the owner, despite full completion by Amega, the general contractor.

In the summer of 1985, when construction payments were wrongfully withheld by Dr. Jatoi, numerous construction liens were filed against the project. Record 000128-30, 000492, 000496, 000500; Transcript I-21-22. Instead of paying these obligations, Dr. Jatoi withdrew $1.25 million in construction funds committed to by the construction lender, which were to have been used to

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1. The record on appeal is designated "Record". For example, an order from the trial court contained at page 00155 will be cited Record 00155. The trial testimony is designated "Transcript", along with a roman numeral, either I, II, or III, to designate the three volume transcript. For example, transcript volume II, page 12, is cited Transcript II-12.

pay for the work, and deposited the funds in an escrow account **expressly designated for payment to Amega** once Amega was able to prove its claim in litigation. Record 000449; Transcript I-26.

On November 5, 1990, this case was called to trial. Both Dr. Alimadad Jatoi and Alcina Jatoi appeared personally, and through a designated attorney of record. During Amega's presentation of evidence, among other things, expert witnesses were examined and Dr. Jatoi was cross-examined concerning alleged false and fraudulent statements Dr. Jatoi made to the savings and loan which originated his construction loan. Transcript III-248-251, 309-310. Two and one-half days into trial, facing considerable evidence in support of Amega and against the allegations of Dr. Jatoi, Dr. Jatoi agreed to settle the case, following advice from the fifth of what was to become seven separate attorneys of record hired by Dr. Jatoi in this litigation.

After settlement, and signing of a judgment and disbursal of funds, Dr. Jatoi filed a *pro se* motion for new trial, which was denied and appealed. During the pendency of that appeal, Dr. Jatoi filed a Federal Rule of Civil Procedure 60(b) motion, again seeking to overturn the voluntary settlement. That motion was denied and appealed. About one year after the trial, following the Fifth Circuit's denial of Dr. Alimadad Jatoi's first appeal, concerning his motion for new trial, Dr. Alimadad Jatoi's wife, Dr. Alcina Jatoi, filed her own Rule 60(b) motion (she had never filed a motion for new trial). That motion was denied, and appealed.

Two of these three appeals -- the first one by Dr. Alimadad Jatoi, and the appeal by Alcina Jatoi -- are not properly before this Court because the Petition for Writ of Certiorari is not timely.

B. Procedural History: Cause No. 91-7003 (Alimadad Jatoi's second appeal)

This is the second appeal of Dr. Alimadad Jatoi, seeking to overturn a voluntary settlement made by him two and one-half days into the trial of this litigation. The first appeal, under Cause No. 91-1086, concerned the trial court's denial of Jatoi's motion for new trial. The trial court's denial was affirmed by the Fifth Circuit in a *per curiam* opinion rendered August 23, 1991.

During the pendency of this first appeal, under Cause No. 91-1086, Dr. Jatoi's sixth attorney, Michael Mosher, filed a motion with the trial court, pursuant to Federal Rule of Civil Procedure 60(b), seeking relief from the judgment on appeal to the Fifth Circuit. The Rule 60(b) Motion was a virtual restatement of the appellate brief in Cause No. 91-1086. That motion was denied by the trial court, and Dr. Jatoi commenced his second appeal *pro se*. This *pro se* appeal was begun after the Fifth Circuit rendered its decision in Dr. Jatoi's first appeal under Cause No. 91-1086. Following several extensions of time, Dr. Jatoi filed a *pro se* brief in his second appeal, which brief was rejected by the Fifth Circuit as inappropriate and inadequate under the Federal Rules of Appellate Procedure. Dr. Jatoi then retained his seventh attorney, Michael Cooper, who essentially repaginated the Rule 60(b) motion filed by Mr. Mosher, which was itself a copy of the first appellate brief, and filed it as a brief in the second appeal, under Cause No. 91-7003. The second appeal is currently before this Court.

This litigation began in 1985 when Amega filed its lawsuit to be paid in the 236th Judicial District Court of Tarrant County, Texas. Due to the nature of the litigation and the large number of innocent people left unpaid for completed and accepted work, there were several accelerated trial settings requested. Record 000073; 000127. Amega

sought and obtained one normal and three preferential trial settings. Record 000127. Dr. Jatoi filed motions for continuance to each trial setting. Record 000127-133; 000381. Continuances were granted on the second setting when, on the eve of trial, Dr. Jatoi's then counsel of record moved to withdraw from continued representation. Record 000381. Later, when the dispute at issue in this appeal was finally to be tried in state district court, in a third attempt to block the trial, Dr. Jatoi filed a meritless motion to disqualify Amega's attorneys. Record 000132. When the motion was denied, Jatoi filed a Writ of Mandamus to strike Amega's counsel and prohibit the third jury trial setting. The Fort Worth Court of Appeals reviewed the writ and denied all relief without necessity of response or hearing. Record 000381. Nonetheless, this trial did not occur for other reasons related to Dr. Jatoi.

Because a large number of materialmen and subcontractors had been unpaid by Dr. Jatoi's refusal to pay monies for work performed and accepted, an accelerated trial setting for seven subcontractor intervenors, but not Amega, was ordered. Record 000131, 000381. Seven trials were held, and seven judgments were entered, stating all work was properly performed. Transcript I-21-22. Each judgment was then paid by Jatoi with the original construction funds held in escrow. *Id.*

Less than one week before the fourth scheduled trial setting, in which Amega's claims were to be tried, Dr. Jatoi filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Record 000152-55; 000381. Following Dr. Jatoi's filing under Chapter 11, Amega filed an emergency application to lift the stay to protect the trial setting and the Texas state court's jurisdiction. Jatoi, of course, opposed the motion. Record 000072; 000152-55. Two hearings were held. Following the second hearing, Judge Abrams of the Federal Bankruptcy Court, Fort Worth Division, entered findings of fact and conclusions of law specifically

disapproving of the "delay" used by Dr. Jatoi to avoid his legitimate obligations, Record 000153, and ordered Dr. Jatoi's attorney not to further interfere with the state court jurisdiction.

Dr. Jatoi did thereupon file an application to remove the remanded state litigation to Federal Bankruptcy Court on the day of the state court's preferential trial setting. Record 000001. Amega immediately filed a motion to remand, asserting that the common law/Texas statutory issues involved in the litigation were not federal in origin nor part of a core, bankruptcy controlled proceeding. Record 000171, 000175, 000176. In an attempt to invent federal jurisdiction, Jatoi amended his counterclaim and asserted a violation of "RICO", 18 U.S.C. 1961, *et seq.* Record 000193. By asserting a "RICO claim", remand was made impossible under the law then in existence, and Jatoi had successfully avoided another trial setting. Record 000193, 000196.

Both Amega and Aetna Insurance Company properly and promptly filed motions to withdraw the reference from the bankruptcy court and sought trial in the United States District Court, Fort Worth Division. Record 000292, 000380, 000660. These motions were granted. The Federal District Court took the escrowed construction funds into its registry pending a trial on all matters. Record 001326, 001597.

While within the Federal District Court system, this case was set for trial six different times, during which Dr. Jatoi's lawyers continued to withdraw one after the other, as they had three times in state court. Record 000127, 131 (state court); 001215, 001429, 001440, 001538, 001735, 001738 (settings); 001673, 001739, 001896 (withdrawals). There was further delay when Jatoi filed motions to extend discovery and otherwise delay resolution of this case. Record 001674, 001701. Finally, this case was called to trial on November 5, 1990. During the third day of trial,

and facing evidence in support of Amega and against the allegations of Jatoi, Dr. Jatoi vacillated on prior offers to settle the case. Such offers were made solely to avoid further court proceedings, delay, and expense. Dr. Jatoi settled this case. Transcript III-326,324.

After settlement, and signing of a judgment and disbursal of funds, Dr. Jatoi filed a *pro se* motion for new trial. The appeals referenced in the first two paragraphs of this Procedural History then occurred. This Court is now faced with the second appeal by Dr. Alimadad Jatoi.

C. Procedural History: Cause No. 91-1086 (Alimadad Jatoi's first appeal) and Cause No. 92-1057 (Alcina Jatoi's appeal)

Dr. Alimadad Jatoi's first appeal, of the trial court's denial of his motion for new trial, was presented to the Fifth Circuit under Cause No. 91-1086. On August 23, 1991, the Fifth Circuit issued a *per curiam* opinion disposing of Jatoi's claims. On November 12, 1991, Dr. Alimadad Jatoi filed with the United States Supreme Court what he called a "Request for Extension of Time to File Pro-Se Petition".

Amega interpreted this "Request" to be a Motion for Extension of Time to File a Petition for Writ of Certiorari. On November 25, 1991, Amega filed a response to the "Request", asking that the request be denied. No further action was taken by Dr. Jatoi until he filed a *pro se* Petition for Writ of *Certiorari* on September 30, 1992. This Petition was returned by the Clerk of this Court for failure to comply with Supreme Court Rule 14, among others. A second Petition was filed on or about November 18, 1992, and received by Amega's and Benedect's attorneys on November 23, 1992.

Dr. Alcina Jatoi's appeal of the denial of her Rule 60(b) motion was decided by the Fifth Circuit under Cause No. 92-1057 on April 23, 1992. Alcina Jatoi's request to

this Court for a Writ of *Certiorari* was not made until September 30, 1992. It, too, was rejected and later refiled with Alimadad Jatoi's second petition.

REASONS THE PETITION SHOULD BE DENIED

I. THIS COURT HAS NO JURISDICTION OVER TWO OF THE THREE APPEALS PRESENTED IN THIS PETITION FOR WRIT OF *CERTIORARI*.

Two of the three appeals presented for consideration in this Petition for Writ of *Certiorari* -- Dr. Alimadad Jatoi's first appeal, under Cause No. 91-1086, and Dr. Alcina Jatoi's appeal, under Cause No. 92-1057 -- were decided by the Fifth Circuit more than 90 days before this Petition for Writ of Certiorari was first filed. The 90-day period set forth in U.S. Supreme Court Rule 13 bars consideration of these two appeals.

The United States Supreme Court has held that this 90-day period "is mandatory and jurisdictional" and "we have no authority to extend" the time for filing. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). *See also Billmeyer v. Tovar*, 469 U.S. 872 (1984) (petition for writ of certiorari denied as "untimely").

As to these two appeals -- Dr. Jatoi's first appeal, and Dr. Alcina Jatoi's appeal -- this Court should deny the Petition for Writ of Certiorari for lack of jurisdiction.

II. THIS IS AN ORDINARY DISPUTE, CONCERNING WELL-SETTLED DOCTRINES OF LAW OF THE CASE AND WAIVER, AND RAISES NO SPECIAL OR IMPORTANT ISSUES.

Rule 10 of this Court permits the discretionary writ of *certiorari* to be granted "*only* when there are special and important reasons therefor." (emphasis added). Alimadad Jatoi has presented nothing new on his appeal of Cause No. 91-7003 (sometimes hereinafter "Jatoi II"). His prior appeal under Cause No. 91-1086 (sometimes hereinafter "Jatoi I") controls all issues presented in this appeal. In his briefing in Jatoi II, Dr. Jatoi did nothing more than repaginate and retype arguments which failed in Jatoi I. Under the well-settled doctrines of law of the case and waiver, Jatoi's complaints are lost. A re-urging of matters, already decided in one appeal, in a second appeal, and not in a motion for rehearing, is not adequate briefing. Dr. Jatoi's second appeal was appropriately decided against him.

A. The issues presented by Jatoi in this second appeal have already been decided against him in an appeal that has become final.

As noted, this is the second appeal by Dr. Jatoi related to his settlement of the underlying litigation. The issues Dr. Jatoi presents to this Court have already been addressed by the Fifth Circuit in Cause No. 91-1086, in an opinion issued August 23, 1991. *See Amega Construction, Inc. v. Jatoi*, No. 91-1086 (5th Cir. August 23, 1991) (reproduced in Petitioners' Appendix at "A", pages 59ff.) Because a panel of the Fifth Circuit had already heard an appeal of this case, involving the same issues that are raised on this second appeal, and because Dr. Jatoi did not appeal that first decision timely, and did not raise any new issues (in fact copying virtually word-for-word his first appellate brief in the second proceeding before the Fifth Circuit), the Fifth Circuit was bound by the doctrine of "the law of the case" and correctly affirmed the trial court's order. *See Adams-Lundy v. Association of Professional Flight Attendants*, 792 F.2d 1368, 1371 (5th Cir. 1986). The holdings of a circuit court must be followed in all subsequent proceedings in the

same case, both in the trial court and on a later appeal in the appellate court. *Id.* The Fifth Circuit's review was limited by settled law -- it could not reconsider the issues presented in the prior appeal. The proper time for Jatoi to have asked for reconsideration of Jatoi I was in a Petition for Rehearing (which was never filed). *Morrison v. Duckworth*, 898 F.2d 1298, 1300, n.2 (7th Cir. 1990).

Even though Jatoi I's opinion is unpublished, unpublished opinions by one panel are binding on all panels of the Fifth Circuit. *United States v. Don B. Hart Equity Pure Trust*, 818 F.2d 1246, 1250 (5th Cir. 1987). *See also* 5th Cir. R. 47.5.3. There have been no United States Supreme Court decisions overruling the principles contained in Jatoi I, nor have there been any changes in statutory law. Therefore, even if other panels of the Fifth Circuit were to have disagreed with the conclusions reached in Jatoi I, they could not change that result. *United States v. Don B. Hart*, 818 F.2d at 1250. *See also Girard v. Drexel Burnam Lambert, Inc.*, 805 F.2d 607, 610 (5th Cir. 1986).

Jatoi I became final when Dr. Jatoi failed to appeal further, either through a rehearing *en banc* to the entire Fifth Circuit, or a timely petition for writ of certiorari, complying with U.S. Supreme Court Rules, to this Court. The decision in the first appeal -- Jatoi I, or Cause No. 91-1086 -- is therefore binding as to two issues: one, Jatoi voluntarily settled this litigation, and the court acted within its discretion both in its involvement in the settlement and in denying Jatoi's motion for new trial; and two, that Jatoi has waived complaints about the actions of his trial counsel. These will be addressed in that order.

Jatoi's voluntary settlement: Jatoi's first appeal was on the following issue concerning the settlement:

> Whether the district court inpermissibly coerced, or inpermissibly contributed to the coercion of the settlement

> memorialized in the final order of the district court.

See Jatoi's first appellate brief, under Cause No. 91-1086, at 6. Jatoi's second appeal presented essentially the same issue:

> It is the contention of the appellant herein, Dr. Jatoi, that a review of the record as a whole, rather than isolated statements by the Trial Judge, clearly establishes that the settlement that Dr. Jatoi entered into of the district court litigation he was involved in . . . was coerced and should be set aside.

See Jatoi's second appellate brief, under Cause No. 91-7003, at 12-13. The same complaint again is made here. *See generally* Petitioners' Petition for Writ at 41.

All issues are identical. The panel of the Fifth Circuit hearing this appeal for the first time had the following to say about this contention:

> Jatoi informed the district court that he wanted to accept a settlement offer; most certainly, he gave the court no indication that he felt coerced. Further, Jatoi affirmed *on the record* that his attorney had authority to discuss settlement. The court did not dictate the terms of the settlement to Jatoi; further, it did not participate in any settlement negotiations.

> At most, the district court simply encouraged settlement negotiation between the parties and their attorneys to take place. It is not improper for a district court to suggest that parties discuss the possibility of settlement. . . . The district court's comments concerning settlement were well within its discretion.

Amega Construction, Inc. v. Jatoi, No. 91-1086, slip op. at 7 (5th Cir. August 23, 1991) (contained in Petitioners' Appendix at "A", pages 68-69). Jatoi has already appealed and lost this issue. He cannot re-litigate issues already decided adversely to him on one appeal, that has become final in a second appeal. Dr. Jatoi's appeal concerning the settlement should be denied.

Jatoi's abandonment by counsel: Dr. Jatoi stated his second contention as follows in the Fifth Circuit proceedings for Jatoi II:

> It is further the contention of the appellant Dr. Jatoi that the record clearly establishes that his counsel abandoned him during the trial of this case and all of those factors, **the coercion exercised by the Trial Judge to affect a settlement**, and abandonment by counsel during a critical process of the trial, required Dr. Jatoi's Rule 60(b) Motion filed with the Trial Court be granted.

See Jatoi brief, in Cause No. 91-7003, at 13 (emphasis added). He has basically repeated this contention here. *See generally*, Petitioners' Petition for Writ at 20. To the extent this second point concerns the action of the trial judge, it is foreclosed by the Fifth Circuit's decision in Jatoi I, Cause No. 91-1086, which is a final judgment not properly before this Court. The contention is also foreclosed because Dr. Jatoi did not present it in Jatoi I, and Jatoi II was merely a restatement, virtually word-for-word, of Jatoi I. The Fifth Circuit addressed this point about Jatoi's trial counsel in Jatoi I, *Amega v. Jatoi*, No. 91-1086 (5th Cir. August 23, 1991), as follows:

> **In his reply brief, Jatoi contends, for the first time on appeal**, that the district court was not solely responsible for the involuntariness of the settlement; that his trial counsel was also at fault "when he coerced a settlement out of Jatoi rather than standing up to the [court] and making a record for appeal." This court has repeatedly held that it is improper to raise an issue for the first time in a reply brief, because the appellee is afforded no opportunity to response. . . .

Amega v. Jatoi, supra at 4, n.3(emphasis added) (found in Appendix A at p. 64). Jatoi made the same mistake in Jatoi II. He copied his original appellate brief in Jatoi I virtually word-for-word, and failed to brief the issue concerning the

actions of his trial counsel. **The Fifth Circuit had already held that Jatoi's first brief did not raise the issue of the responsibility of Jatoi's trial counsel for the alleged involuntary settlement. Because Jatoi did not choose to rewrite or add anything of substance to his brief from the first appeal, he waived this contention yet again.**

The Fifth Circuit was bound by the doctrine of "the law of the case," in ruling on Dr. Jatoi's second point. This doctrine is well settled and is neither mentioned nor challenged by Dr. Jatoi. Dr. Jatoi's Petition should be denied.

B. Dr. Jatoi has waived his point on the actions of his trial counsel by his failure to adequately brief them.

Amega and Benedict believe that Dr. Jatoi's entire appeal is foreclosed by the Fifth Circuit's prior decision in Jatoi I, *Amega v. Jatoi*, No. 91-1086 (5th Cir. August 23, 1991). However, if this Court feels that Dr. Jatoi's second appellate point regarding the conduct of his attorney has not already been decided, Jatoi has waived the point by his inadequate briefing.

As noted, Jatoi simply copied word-for-word his first appellate brief, in presenting his second appeal. No new authorities were cited by Dr. Jatoi in Jatoi II, his second appeal to the Fifth Circuit. The authorities cited by him, at pages 13-23 of his second Fifth Circuit brief, all deal with and are directed toward the actions of the trial court. Such violated Fifth Circuit briefing rules. *See* Fed. R. App. Pro. 28(a)(5) and Fifth Circuit R.28.3. Similarly here, in his Petition for Writ, no case is cited which addresses the issue of the actions of an attorney which could support the granting of a Rule 60(b) Motion. Such violates Supreme Court Rules 14 and 33. Such actions amount to waiver of the issue concerning the conduct of Jatoi's trial attorney.

Issues raised but not briefed are waived. The U. S. Supreme Court has on several occasions refused to grant a writ of *certiorari* in a case involving waiver under Federal Rule of Appellate Procedure 28(a)(5). That rule requires that the appellant's argument contain the reasons he deserves the requested relief "with citation to the authorities, statutes and parts of the record relied on." Failure to argue the point with authorities means that the point has been inadequately briefed, and is therefore waived. *See Weaver v. Puckett*, 896 F.2d 126, 127 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 427, 112 L.Ed.2d 411 (1990); *Brown v. Trustees of Boston University*, 891 F.2d 337, 352 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990); *United States v. Lindell*, 881 F.2d 1313, 1325 (5th Cir. 1989), *cert. denied*, 493 U.S. 1087 (1990). A bare listing of issues without supporting authorities is insufficient, and the claims are considered "abandoned" on appeal. *United States v. Ballard*, 779 F.2d 287, 295 (5th Cir.), *cert. denied*, 475 U.S. 1109 (1986). Appellate practice is not intended to include "notice pleading." *Id.* Mere sentences, without citation to authority, is not "argument." Mere restatements of motions made in a district court, without more, are waived. *Heller Financial, Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir. 1989).

Jatoi has presented nothing new in Jatoi II. He has failed to brief any issue not presented in Jatoi I. He has waived any argument not presented in Jatoi I, by failing to present it here in Jatoi II. Dr. Jatoi is otherwise foreclosed on all issues raised in the first appeal by the Fifth Circuit's opinion previously rendered in Jatoi I, *Amega v. Jatoi*,, No. 91-1086 (5th Cir. August 23, 1991), which has become final. Jatoi's Petition should be denied.

C. The trial court did not abuse its discretion in denying Jatoi's Rule 60(b) Motion.

Amega and Benedict believe that all issues presented by Jatoi in this appeal are foreclosed by the doctrines of "the law of the case" and waiver. However, should the Court choose to consider Jatoi's complaints concerning the denial of his Rule 60(b) Motion, Amega and Benedict assert that the Motion was properly denied, and that the trial court below did not abuse its discretion in denying the Motion.

The granting or denial of a Rule 60(b) Motion is addressed to the sound discretion of the district court, and in the absence of an abuse of discretion, an appellate court will not review the district court's determination. *Hand v. United States*, 441 F.2d 529, 531 (5th Cir. 1971) (*per curiam*). This is the same standard of review the Fifth Circuit used in Jatoi I, in reviewing the district court's decision on Jatoi's Motion for New Trial. *Amega v. Jatoi*, No. 91-1086, slip. op. at 4 (5th Cir. August 23, 1991) (found in Petitioners' Appendix at 63). Courts apply "an especially differential standard" in cases where motions directed to the sound discretion of the trial court are involved. *Id.*

A court does not abuse its discretion in denying a Rule 60(b) motion where no new facts are presented to the Court, or the facts presented are the same as when judgment was entered. *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 (5th Cir. 1989). Here, Jatoi complained (the first time) in his Motion for New Trial and other efforts to overturn the voluntary settlement that the judge and his lawyers "terrified" him. *See* letter dated November 9, 1990 from Jatoi to the Honorable Judge McBryde, found at Tab 7 of Appellant's Fifth Circuit Appendix, in Cause No. 91-7003. Jatoi's Rule 60(b) Motion did nothing other than expand on this first concept, in that Jatoi added a few allegations to his basic assertion that the trial court and his lawyers "coerced" him into settling his case. *Compare* Rule 60(b) Motion found at Appellant's Fifth Circuit Appendix, in Jatoi II, under Cause No. 91-7003, Tab 2, *with*

Jatoi's Motion for New Trial and letter to the Judge, found at Tabs No. 4 and 7, respectively, in that same Appendix. There was no abuse of discretion in the Judge's first decision related to the motion for new trial. There is likewise no abuse of discretion in the second decision on the Rule 60(b) Motion. The Judge, on essentially the same facts, simply denied Jatoi's meritless Rule 60(b) Motion. Jatoi's Petition should be denied.

D. Rule 60(b) is not an excuse to re-litigate, and attorney conduct is not an excuse under Rule 60(b).

Amega and Benedict assert that Jatoi's claims are barred by the doctrines of law of the case and/or waiver, and that the Judge did not abuse his discretion in denying either Jatoi's Motion for New Trial or his Rule 60(b) Motion. Nonetheless, should this Court determine that Jatoi has not lost his appeal on these points, Jatoi should lose on the merits of his allegations -- which are none.

Dr. Jatoi claims in this appeal that Rule 60(b) allows him to vacate the consent judgment freely agreed to by him at trial. First, Amega and Benedict would point out that there must be a fairly strong showing made by the litigant seeking to vacate such a judgment, and simple financial "discomfort or inconvenience" is insufficient to vacate this judgment. *See SEC v. Hatch*, 128 F.R.D. 58, 63 (D.N.J. 1989); *C. Wright & A. Miller, Federal Practice and Procedure: Civil* §2863 at 207 (1973). A litigant may also not vacate a judgment simply because he is "unhappy". *Bernard v. Missouri Division of Employment Security*, 95 F.R.D. 107, 109 (W.D. Mo. 1982). *See also Wright & Miller, Federal Practice and Procedure,* §2858 at 170. Dr. Jatoi had no grounds for a new trial, and likewise has no grounds for a vacation of this consent judgment, or any other aspect of this appeal.

Jatoi has not properly briefed the point that his lawyer's action, or inaction, is grounds for granting a Rule 60(b) Motion. *See generally*, Petition for Writ at 20. That is understandable. There are numerous cases on the proper grounds for vacating a judgment under Rule 60(b) -- and it is settled that the actions of one's lawyer are just not within the allowed grounds. The following are clearly **not** grounds to vacate any settlement:

1. The actions of Jatoi's attorney -- either error, carelessness, or failure to call witnesses or introduce evidence, or object at trial. *Bernard v. Missouri Division of Employment Security*, 95 F.R.D. at 109; *See also, Pelican Production Corp. v. Marino*, 893 F.2d 1143, 1144 (10th Cir. 1990) (attorney's failure to act).

2. Malpractice of Dr. Jatoi's attorney. *Peake v. First National Bank and Trust Co.*, 101 F.R.D. 544, 545-46 (W.D. Mich. 1984); *Blinder, Robinson & Co. v. SEC*, 748 F.2d 1415, 1420 (10th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) ("keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant," and that would be wrong).

3. The ignorance of Dr. Jatoi's attorney as to the law, or local rules -- such as his failure to properly designate deposition testimony (Transcript II-135-36), or decision not to call certain

witnesses (Transcript III-254). *See United States v. Erdoss*, 440 F.2d 1221, 1223 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971) (a conscious decision made in ignorance of law is not grounds for Rule 60(b) motion).

4. Erroneous strategic or tactical decisions, such as Jatoi's decision to release all his witnesses during trial (Transcript III-254). *See Lloyd v. Carnation Co.*, 101 F.R.D. 346, 348-49 (M.D.N.C. 1984) (failure to submit certain evidence).

Jatoi is not entitled to "a second bite at the apple" merely because he is not satisfied with his attorney. *Id.* at 346; *Bernard*, 95 F.R.D. at 109. Rule 60(b) is not designed to operate as an insurance mechanism for dissatisfied clients. Its purpose is not to give relief to a client who does not happen to have the best lawyer for the job. The neglect or error of an attorney is the neglect or error of the client. *Link v. Wabash Railroad*, 370 U.S. 626, 633-34 (1962). Even if Jatoi's trial counsel, Mr. Curtis, was careless or negligent, he is the one who should be penalized through a malpractice suit. *Id.* at 634, n.10. Such a suit is believed to remain pending in a Tarrant County, Texas district court. *See* Motion and Brief of Aetna Insurance Company for Sanctions, filed in Cause No. 91-7003, at 3. The innocent parties -- Amega and all the other respondents -- should not suffer for Mr. Curtis' alleged "sins." *Link*, 370 U.S. at 634, n. 10.

Jatoi should not be allowed to use Rule 60(b) to relieve himself of the consequences of a voluntary settlement, his freely made litigation choices or his and his lawyer's

alleged improvident strategic decisions. Jatoi agreed not once, but twice on the record that this settlement was his decision. He had days to digest what was happening at trial, and several nights and recesses to discuss and contemplate settlement. *See, e.g.*, Transcript III-326 and 334 (two individual appearances and confirmations of assent to settle, separated by a recess). Dr. Jatoi's current protestations to the contrary, including his plea that he wanted more money, are merely the result of his mistaken belief that he had done Respondents no wrong, and owed them no money.

This litigation needs to end. As this very court put it over 40 years ago:

> There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from.

Ackerman v. United States, 340 U.S. 193, 198 (1950). Dr. Jatoi's Petition should be denied.

E. The trial court committed no "plain error" and acted within its discretion in conducting the trial.

Amega and Benedict believe that Jatoi has already had his appeal on the conduct of his trial, and he lost it the first time. The Fifth Circuit not only found that Judge McBryde acted within his discretion in the complaints made by Jatoi on the first appeal, it also noted that objections to the Judge's conduct were not properly preserved. *Amega v. Jatoi*, No. 91-1086, slip op. at 10, n.4 (August 23, 1991) (Petitioners' Appendix at 74). Under the law of the case, the actions of Judge McBryde have already been found to be proper.

Nonetheless, if this Court is to consider Dr. Jatoi's complaints again, it should overrule them, for two reasons -- first, there is no "plain error" shown in the record, and

second, even if the objections made by Jatoi were properly preserved, Judge McBryde acted well within the scope of an ordinary federal district court trial judge. These will be addressed in turn.

The standard of review applicable to Jatoi's complaints about the conduct of the trial is "plain error." Jatoi acknowledges that no objections were made to the alleged conduct of Judge McBryde. *Id.* Failure of Jatoi to call the Court's attention to the alleged prejudicial comments and conduct limits any appellate court to ruling on "plain error." *Harris v. Steelweld Equipment Co.*, 869 F.2d 396, 402 (8th Cir.), *cert. denied*, 493 U.S. 817 (1989) (appellant's failure to object to court's alleged improper comments at trial waives the complaint, and the court is limited to review for "plain error"). Plain error is not shown on this record.

Judge McBryde acted within the scope of his basic duties to expedite a trial and to prevent unnecessary and duplicitous testimony. It is well settled that a federal court trial judge is not a mere presiding officer, but instead has as his function the conduct of a trial in an orderly way to elicit truth and to attain justice between the parties. *Faudree v. Irons City Sand & Gravel Co.*, 315 F.2d 647, 651 (3d Cir. 1963). A federal trial court judge must do five things: One, see that issues are not obscured; two, see that the trial is conducted in a proper manner; three, see that testimony is not misunderstood by the jury; four, check counsel in any effort to obtain an undue advantage or to distort evidence; and five, curtail unnecessarily long and tedious examinations of witnesses. *Id.* The last two functions are particularly relevant in this case. Judge McBryde merely exercised his proper functions, and all the complaining by Jatoi is really the result of his desire to avoid paying legitimate obligations, and to avoid living up to his word, given freely in a voluntary settlement.

One of Jatoi's main complaints is that Judge McBryde instructed counsel to limit the examination of witnesses to relevant issues. He spends over a page addressing this point. *See* Petition for Writ at 20-21. It is well settled that a trial court may instruct counsel to limit cross-examination to relevant issues. *Propst v. Greene*, 123 F.R.D. 535, 539 (W.D.N.C. 1988). It is even appropriate for the court to question witnesses to complete counsel's cross-examination, to limit counsel's questioning, and to exclude items from evidence which are "irrelevant" and a "waste of time." These are well within a trial judge's duties. *Id. See also Amega v. Jatoi*, No. 91-1086, slip op. at 10, found in Appendix at 73-74.

Jatoi also complains that Judge McBryde directed alleged coercive remarks to his lawyer and to witnesses at trial. *See* Petition at 20-21. A district court is allowed to create an orderly and expeditious presentation of evidence, and it is not an abuse of discretion to instruct witnesses to answer questions without digression, and by extension, to similarly instruct counsel. *Haney v. Mizell Memorial Hospital*, 744 F.2d 1467, 1477 (11th Cir. 1984). The scope and extent of cross-examination is well within the sound discretion of a trial judge, and will not be generally disturbed on appeal. *See, e.g., United States v. Phelps*, 733 F.2d 1464, 1471 (11th Cir. 1984).

Judge McBryde's comments directed to the litigants related to settlement were also proper at law. *See Amega v. Jatoi, supra*, op. at 10 (found in Appendix at 74). Jatoi's complaint that he was "coerced" by the court is "frivolous." *Id.* It is always proper for a court to show litigants the disadvantages of a fight to the finish, and to encourage settlement and conciliation between the parties. *See* Fed.R.Civ.P. 16(a)(5) and (c)(7) (district court may direct parties and attorneys to appear at conference for purposes of facilitating settlement). This Court has denied certiorari in similar cases.

See Ullman v. Olwine, Connelly, Chase, O'Donnell & Weyher, 123 F.R.D. 253 (S.D. Ohio 1987), *aff'd*, 857 F.2d 1475 (6th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989) (mere suggestion of settlement discussions is not coercion). The district court was well within its discretion.

Since Judge McBryde acted well within his discretion as a trial judge, and since an attorney's acts, even neglect, are not grounds for granting a Rule 60(b) Motion, Jatoi's Petition should be denied.

F. The law favors settlement.

Jatoi claims in this second appeal of this litigation that he somehow has the right to avoid a settlement freely made and upon which other parties have relied. The Fifth Circuit was correct in rejecting both the first and second appeals by Jatoi. The parties had accepted the settlement in a final, complete conclusion of the case. The money that the parties were fighting over has been disbursed. Record 002420. Trial exhibits and demonstrative evidence were released to the parties. Transcript III-337-338. Forty-three volumes of depositions and hundreds of exhibits were returned to the state district court following the trial. Record 001957. This case is over, and it should remain over.

There is little more sacred and established law than that law holding settlements to be favored. The basic and century-old principle is the same as the U.S. Supreme Court itself once held -- where the parties, acting in good faith, settle a controversy, the courts will enforce the compromise **without regard to what the result might have been had the parties chosen to litigate to the end.** *Hennessy v. Bacon*, 137 U.S. 78 (1890), cited by *Terrain Enterprises, Inc. v. The Western Casualty and Surety Co.*, 774 F.2d 1320, 1321 (5th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986).

This settlement should be affirmed. Jatoi should not be allowed to escape his obligations, especially where he expressed not once but twice on the record that he approved the settlement of this case. Transcript III-326, 334. The Fifth Circuit has already spoken on this issue in a final judgment. *See Amega v. Jatoi*, No. 91-1086 (August 23, 1991). Jatoi's Petition should be denied.

III. THE FEDERAL COURTS HAVE THE INHERENT POWER TO SANCTION LITIGANTS FOR FRIVOLOUS APPEALS.

Dr. Alimadad Jatoi claims in his Petition for Writ that sanctions against him were inappropriate and violate his rights as a litigant. That is not true. The Federal Rules of Appellate Procedure have long allowed the imposition of sanctions, including the assessment of attorneys' fees and costs, for frivolous appeal. *See, e.g.*, Fed.R.App.Proc. 38. Federal circuit courts have not hesitated to assess penalties against an appellant for prosecuting a frivolous appeal, including the Fifth Circuit Court of Appeals, which imposed sanctions on Dr. Jatoi. *See, e.g., Foret v. Southern Farm Bureau Life Insurance Co.*, 918 F.2d 534 (5th Cir. 1991); *Coghlan v. Starkey*, 852 F.2d 806 (5th Cir. 1988).

This Court has denied the petition for writ of certiorari in other similar sanctions cases. In *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860 (7th Cir.), *cert. denied*, 419 U.S. 870 (1974), a stubborn litigant appealed for a second time a judgment entered pursuant to a voluntary settlement. As is the case with Dr. Jatoi, the appellant in *Clarion* claimed that the settled case had been mishandled by former attorneys. The Seventh Circuit did not hesitate to impose Rule 38 penalties, and this Court did not disturb that assessment, once the Seventh Circuit found that the appellant's course of action "has been frivolous and obstructive and has caused a shameful waste of judicial

manpower." *Id.* at 865. *See also Trecker v. Scag*, 747 F.2d 1176 (7th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985) (assessing attorneys' fees and double costs as penalties against appellant's counsel for frivolous appeal, the second appeal in that matter).

Respondents believe this case is one that is very appropriate for the imposition of sanctions by an appellate court. Unfortunately, the actions of litigants such as Dr. Jatoi are all too common in the federal system. Without significant penalties imposed for delay and frivolity, litigants are free to drive up the costs of collection of legitimate obligations. Respondents believe that a neutral review of the facts of this lawsuit will show that Dr. Jatoi's claim is not only without merit, it has been pursued solely to frustrate Respondents in the collection of valid debts.

The purposes of sanctions were well and thoughtfully expressed in *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d 468, 471-73 (1st Cir. 1985). One purpose is to encourage attorneys both to police their own determinations whether to appeal and to discourage their clients from taking bootless appeals. The attorney who was sanctioned by the Fifth Circuit -- Michael Cooper -- has not appealed the sanctions against him.

A second purpose of sanctions is to compensate for the risk that defendants such as Dr. Jatoi may resist well-founded claims simply in hopes of wearing down their adversaries, knowing that the costs of collection may prove prohibitive. *Id.* In this case, the attorneys' fees through trial alone exceeded $400,000. See Tr. III-328. Given the fixed amount available in escrow, approximately $1.25 million, these attorneys' fees amount to a large share of the potential recovery by Respondents. "Frivolous" and "thinly disguised" abuse of the judicial process ought not to go unpunished. *Aetna Insurance Co. v. Jatoi*, No. 91-7003, slip op. at 2-3 (5th Cir. June 30, 1992), found in Appendix at 79.

In the face of these concerns, Respondents feel that the Fifth Circuit appropriately awarded fees and costs to Respondents as sanctions against Dr. Jatoi and his counsel. Dr. Jatoi had an adequate opportunity to respond to Respondents' Motions, and in fact did respond to the Motions. *Id.* at 2-3, found in Appendix at 79-80. *See also, Aetna Insurance Co. v. Jatoi*, No. 91-7003, slip op. at 2 (5th Cir. July 21, 1992), found in Appendix at 84. There is no due process or other violation here, especially where Dr. Jatoi was notified of the pending motions, and responded in defense.

The issues raised by Jatoi's petition involve matters of law which are well settled by prior decisions within the federal system, and do not involve any conflicting state or federal decisions at all. Jatoi's petition should be denied.

IV. SANCTIONS FOR A FRIVOLOUS PETITION ARE APPROPRIATE.

Supreme Court Rule 42.2 provides that "just damages" and single or double costs may be awarded to the appellee or respondent when an appeal or petition for certiorari is "frivolous." Two of the three appeals presented in this Petition are clearly time-barred, and the third is subject to well-settled principles such that it too should never have been filed.

This Court has shown an increasing desire to discourage frivolous petitions for writ of certiorari. *See, e.g., Hyde v. Van Wormer*, 474 U.S. 992 (1985). An award of costs or other damages seems appropriate under these circumstances.

CONCLUSION

The questions that Petitioners raise are neither special nor important. Two of the three judgments for which a writ of certiorari is sought are time barred under the express rules of this Court. The third judgment involves no unsettled questions of law and is entirely consistent with the prior rulings of courts within the federal system and this Court on the issues presented concerning waiver, law of the case, and sanctions. There is no violation of any provision of the United States Constitution. Accordingly, the Petition should be denied, and costs or other damages awarded to Respondents.

Respectfully submitted,

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